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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH,

Petitioner,

vs.

THE SOUTHERN STEAMSHIP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

PAUL M. GOLDSTEIN,
CHARLES LAKATOS,
SAMUEL J. STARK,
Of Counsel.

INDEX.

Subject Index.

	Page
Brief on behalf of petitioner on writ of certiorari	1
I. The opinions of the courts below	1
II. Jurisdiction	2
III. The statement of the case	2
IV. Specifications of error	4
V. Argument	4
(a) Summary of Argument	4
(b) First Point—The Shipowner is Charged with an Absolute and Non-Delegable Duty to Supply and Keep in Order all the Proper Appliances Appurtenant to the Ship	5
(c) Second Point—The Shipowner is Liable for Injury Due to a Defective Appliance Notwithstanding That There Are Other Safe Appliances Available	7
(d) The Pinar Del Rio	9
(e) Socony-Vacuum Oil Co. vs. Smith	12
(f) Third Point—The Negligence of a Fellow Seaman in Selecting a Defective Appliance from an Abundant Supply of Suitable Appliances Does Not Insulate the Shipowner from Liability	16
VI. Conclusion	21

Table of Cases Cited.

Hanify, J. R. Company v. *Westberg*, 16 F. (2d) 552	8
Hough v. *Texas & Pacific R. R. Company*, 100 U. S. 213, 25 L. Ed. 612	17
Julia Fowler, The, 49 Fed. 277	9
Navarino, The, 7 Fed. (2d) 743	9
Noddleburn, The, 28 Fed. 855	7, 16
Olson v. *Flavel*, 34 Fed. 477	15
"Osceola," The, 23 Sup. Ct. 483, 189 U. S. 158, 47 L. Ed. 760	5

Page

Plamas v. *Pinar Del Rio*, 277 U. S. 151, 48 Sup. Ct. 457, 72 L. Ed. 827 9
Portland, The, 213 Fed. 699 8
Sabine Towing Company v. *Brennan*, 72 Fed. (2d) 490 6
Scandrett, H. A., 87 Fed. (2d) 708 5
Seeandbee, The, 102 Fed. (2d) 577 21
Socony-Vacuum Oil Company v. *Smith*, 305 U. S. 424, 59 Sup. Ct. 262, 83 L. Ed. 265 4
Work v. *Leathers*, 97 U. S. 379, 24 L. Ed. 1012 7

STATUTES CITED.

Judicial Code, 43 Stat. 938 U. S. C. Title 28, Section 347 (a) 2
Jones Act, 41 Stat. 1007 (1920) 46 U. S. C. A. 688 3

CONSTITUTION OF THE UNITED STATES.

Article 3, Section 2 2

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I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 1) was rendered under date of July 10, 1941, and is reported in 45 F. Supp. 839.

The per curiam opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered on July 14, 1942, and is reported in 129 F. (2d) 857 (R. 5).

The opinion of the United States Circuit Court of Appeals for the Third Circuit on rehearing was rendered on May 5, 1943, and is reported in 135 F. (2d) 602 (R. 5).

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Third Circuit, affirming the decree of the District Court is May 5, 1943.

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229 Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347 (a) and under Article 3, Section 2, of the Constitution of the United States.

III.

The Statement of the Case.

This is a seaman's action for personal injuries in admiralty under the general maritime law. The libel alleges two causes of action, one for indemnity damages based on an alleged unseaworthy condition, and the second for maintenance and cure. This petition is not concerned with the latter cause of action. The pertinent facts essential to this proceeding are not in dispute and may be stated as follows:

Petitioner, libellant below, is an American Merchant seaman and was employed by the respondent as an able seaman on its vessel "Wichita Falls" (R. 34). The vessel was engaged in the Coastwise trade between Philadelphia and Houston, Texas, each complete voyage taking about twenty-one or twenty-two days (R. 56).

On August 17, 1934, while the vessel was at sea, petitioner, after standing his wheel watch was assigned to paint the

front of the bridge with another member of the crew. The scaffold upon which he was to work had already been rigged by the boatswain. It consisted of a wooden plank about twenty feet long, one foot wide and two inches thick and weighed approximately fifty or sixty pounds (R. 36, 37). The stage was supported by two ropes, one on either end, extending up the front of the bridge and secured on the back of the pilot house (R. 37, 38). The rope, according to the chief officer was three inches in circumference (R. 220), and according to the boatswain, was a little wider than a quarter and a little less than a half dollar (R. 215).

Petitioner ascended the scaffold and just as he started to paint, one of the ropes holding the scaffold broke, and he fell about fifteen feet to the deck below with resultant serious injuries (R. 39). At that time, the rope, where it had parted, appeared to be decayed (R. 40). The first mate testified that he and the boatswain before rigging the scaffold had examined the rope by twisting it (R. 221). The rope had been in the lyle gun box for over two years and had never been used (R. 228). The lyle gun was used for practice drill every three months, but an old rope was used on those occasions. The lyle gun is used in case of emergency for life saving at sea (R. 221).

This action was commenced over three years after the accident thereby precluding any right of action under the Jones Act (41 Stat. 1007 (1920), 46 U. S. C. A. 688), which presently contains a limitation of three years (formerly two years). The action was therefore brought in Admiralty under the general maritime law, under which there is no statute of limitations, but the rule of laches is applicable. The courts below held that petitioner, under the evidence, was not guilty of laches and decided the case on the merits under the general maritime law.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

First: In holding that the shipowner was not liable in indemnity for an injury due to a defective rope because the mate was negligent in selecting a defective rope when there were other good ropes available.

Second: In failing to hold that a defective rope constituted an unseaworthy condition notwithstanding that there were other good ropes aboard.

Third: In holding that the "Pinar Del Rio" was the controlling authority governing the case at bar.

Fourth: In failing to follow the doctrine laid down in *Socony-Vacuum Oil Co.* v. *Smith*, to the effect that the shipowner was liable for an unsafe appliance even though there is an abundant supply of safe appliances available.

Fifth: In failing to hold that the negligence of the mate in selecting a defective rope to be used by the petitioner was the negligence of the common master.

V.

ARGUMENT.

Summary of Argument.

The undisputed facts show that the mate selected a defective length of rope from a large coil of rope in the lyle gun box. The courts below found as facts that the rope was defective and that the mate was negligent in selecting that defective length of rope from the large coil. On this set of facts petitioner contends that the respondent is liable

under the general maritime law first because it supplied a defective rope notwithstanding there was other good rope available, and second because the negligence of the mate in selecting the bad rope was imputable to the master. In support of the foregoing petitioner makes the following contentions:

(1) The shipowner is charged with an absolute and non-delegable duty to supply and keep in order all the proper appliances appurtenant to the ship.

(2) The shipowner is liable for injury due to a defective appliance notwithstanding that there are other safe appliances available.

(3) The negligence of a fellow seaman in selecting a defective appliance from an abundant supply of suitable appliances does not insulate the shipowner from liability.

FIRST POINT.

The shipowner is charged with an absolute and non-delegable duty to supply and keep in order all the proper appliances appurtenant to the ship.

One of the most oft cited cases relating to the shipowners' duty on this point is the "Osceola", 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, in which this Court laid down the following doctrine (P. 155):

> "That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

In the H. A. Scandrett, 87 F. (2d) 708, the suit was likewise under the general maritime law. The court set forth the

shipowner's duty under that law as unmodified by the Jones Act as follows (P. 710):

> "This is not an action under the Jones Act (41 Stat. 988) founded on negligence. The libelant is invoking a remedy based on unseaworthiness or defective condition of the vessel or her equipment. In such a case the liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute."

(P. 711):

> "In our opinion the libelant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.
>
> "The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. Sec. 190-195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation. Nor does this seem an unduly harsh imposition. A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put. It seems to us that everything is to be said for holding her absolutely liable to her crew for injuries arising from defects in her hull and equipment."

The duty is a continuing as well as a non-delegable one and fastens liability to the shipowner irrespective of negligence. The rule is set forth in *Sabine Towing Co.* v. *Brennan*, 72 F. (2d) 490, as follows (P. 494):

> " 'The duty of shipowners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, responsibility for which they cannot escape by delegating its performance to another. In this respect it is like the common-law duty of a master to provide

his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation.' Christopher *v.* Grueby (C. C. A.) 40 F. (2d) 8, 12.

"*This duty as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses.* Carlisle Pkg. Co. *v.* Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927; The Silvia, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241; Martin *v.* The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. Ed. 65." (Italics ours.)

There is an implied warranty by the shipowner that the vessel and her appliances are seaworthy, The Noddleburn, 28 Fed. 855. In *Work* v. *Leathers*, 97 U. S. 379, 24 L. Ed. 1012, the court held, concerning the owner's duty (L. Ed. p. 1013):

"*If there be defects known or not known he is not excused.* He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. *Such is the implied contract* where the contrary does not appear * * * *If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.*" (Italics ours.)

SECOND POINT.

The shipowner is liable for injury due to a defective appliance notwithstanding that there are other safe appliances available.

Although it is conceded that the appliance in the case at bar was defective, the respondent attempts to avoid his liability by showing that there were other proper appliances aboard which could have served the purpose. The necessary inference from such an argument follows that the shipowner is only obligated to furnish *some* appliances which are safe. To carry this theory to an extreme, a shipowner

in providing ten coils of rope for the vessel would only have to prove that one of those coils was sound and he thereby would relieve himself of liability for any defects in the other coils. This is of course an utterly absurd theory and is entirely inconsistent with the decisions from the earliest times to the present date.

In *J. R. Hanify Co.* v. *Westberg*, 16 F. (2d) 552 (C. C. A. 9), the injury was caused by a defective sling. The cause was tried and decided under the general maritime law. Said the court (P. 553):

> "Where the only appliances suitable for the work are defective—and there is some evidence that the sling which parted was the only one long enough for use in handling the particular load here involved—liability for resulting injury is unescapable. Even where a quantity of appliances are furnished, all presumably suitable for the work, but some of them defective, *the fact that a selection must be made by a fellow servant of an injured workman is unimportant, and the use of one of them which is defective will not shift the responsibility.* Rosseau v. Deschenes, 203 Mass. 261, 89 N. E. 391; Thomas v. Ann Arbor Ry. Co., 114 Mich. 59, 72 N. W. 40. To hold otherwise would be virtually to abrogate the rule that the duty to use due care to furnish safe appliances is non-delegable." (Italics ours.)

In the *Portland*, 213 Fed. 69, the shipowner furnished rope for the construction of slings. The slings were furnished to the men in numbers beyond what was required so that the men had a choice of slings. The sling which was selected proved to be defective and broke, causing an injury. The court held the shipowner liable because of his non-delegable duty to provide proper appliances. Said the court (P. 700):

> "Doubtless the sling is an appliance, and it was incumbent upon the ship to exercise due and reasonable

care and precaution to furnish a safe appliance of the kind. It was furthermore incumbent upon the ship to use like care and precaution to keep the appliance in suitable repair for the use to which it was to be devoted. This includes the duty of making inspections, tests, and examinations at the proper intervals. Union Pacific Ry. Co. *v.* Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

"Nor can this duty be delegated to another so as to escape responsibility for its proper observance and discharge. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612."

In the *Julia Fowler*, 49 Fed. 277, the court held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover but with diminution of damages because of his negligence in using the unsafe rope.

The choice of an unsafe appliance in Olson *v.* Flavel, 34 Fed. 477, where a safe one was available did not relieve the shipowner of liability but merely mitigated the damages.

In the Navarino, 7 F. (2d) 743, one of the crew selected a defective block from a number of good blocks. The shipowner was held liable for the injury due to the defective block, which defect, said the court, rendered the vessel unseaworthy.

It is thus quite clear that the general maritime law would compel an award for indemnity under the facts at bar. The Circuit Court of Appeals below, however, felt itself bound to follow the statement in the "Pinar Del Rio", which is contrary to the consistent trend of the prior cases. It is therefore essential to carefully analyze that opinion.

The Pinar Del Rio.

The opinion by Mr. Justice McReynolds discloses the following. The plaintiff was a Spanish citizen and was a

member of the crew of the British ship "Pinar Del Rio". While the vessel was in the port of Philadelphia, the plaintiff was hoisted up to paint the smoke stack. The rope broke, causing his fall and injury. The defective rope which caused the accident was selected by the mate from an abundant supply of good rope. Suit was brought *in rem* claiming under Sec. 33 of the Jones Act. The District Court dismissed the action on the ground that the parties were governed by the law of the ship's flag (English). The Circuit Court of Appeals affirmed the judgment of dismissal but on an entirely different ground, namely, that a lien against the vessel is essential to every proceeding *in rem* against her, and that no such lien arose by reason of the Jones Act in favor of the injured seaman. Certiorari was granted by this Honorable Court and as we read the opinion, the only issue which this Court undertook to decide was the finding of the court of appeals that no lien arose from the Jones Act. On page 155, the opinion shows:

> "We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Sec. 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters."

Following the above quotation, is the statement which has precipitated the conflict in the case at bar and which compelled the Circuit Court of Appeals below to depart from the prior settled principles of the Maritime Law. That statement is as follows (P. 155):

> "The record does not support the suggestion that the "Pinar Del Rio" was unseaworthy. The mate selected a bad rope when good ones were available."

There is no discussion or citation of authority in support of this statement and as further evidence that it was not

a decided issue, and did not reflect the opinion of any other than the writer, the next statement reads (P. 155):

> "We must treat the proceeding as one to enforce the liability prescribed by sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based on that section. The evidence would not support a recovery upon any other ground."

The remainder of the opinion is devoted to the question of whether a lien arose from the Jones Act.

If the second quotation be considered as an issue decided by the court, then, as Judge Biggs in his dissenting opinion in the case at bar, stated (P. 605):

> "The decision of the majority of the Court in effect holds that the Supreme Court by Mr. Justice McReynolds' single sentence upset the then existing rule of maritime law."

We suggest that if the court had in fact contemplated that issue, there would have been a complete discussion disposing of the prior law. The more logical view would seem to be that the statement in controversy was only an observation or assumption of the writer and did not reflect the opinion of the court. This view is supported by the last excerpt quoted from that case. There, it is specifically stated that the court was considering the problem only from the standpoint of the applicability of the Jones Act to the suit *in rem*. The utter lack of discussion or citation of authority, especially in view of the great weight of authority to the contrary clearly indicates that the court did not undertake the consideration or disposition of that problem.

The strongest evidence that this Court did not intend the controverted statement as a part of its decision, is the opinion of this Court in *Socony-Vacuum Oil Co.* v. *Smith*,

supra. Even if the Pinar Del Rio be construed to be in point, the *Socony* case would necessarily overrule it. It may be noted that Justice McReynolds dissented from the remainder of the court in the *Socony* case.

Socony-Vacuum Oil Co. v. Smith.

The suit there was by a seaman to recover for injuries due to his use of a defective appliance instead of a safe one which was available. The suit was brought under the Jones Act and one of the defenses was assumption of risk. In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence. It refused the defendant's request for an instruction that if the seaman could have performed his duty without the use of the defective appliance, he assumed the risk of injury from it; instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance. Judgment of the District Court, upon a verdict in the seaman's favor was affirmed by the Court of Appeals. Certiorari was granted by this Court, and the judgment was affirmed. Since the suit sought the benefits of the Jones Act it was contended that the defense of assumption of risk was available because that act did not abolish that defense. This Court considered the case as brought under the maritime law before the Jones Act for the answer to the problem. Said the court (P. 428):

> "• • • the Jones Act, in extending to seamen all the rights to recover for injuries resulting from defective appliances given to railway employees • • • had left undisturbed the admiralty rule with respect to assumption of risk."

We make note of this point because the court below held that the *Socony* case was under the Jones Act and therefore not applicable. It is clear that if the sole remedy were

under the railway acts the defense may have been available. However since the Jones Act was a cumulative remedy and not an alternative one the court went back of the Jones Act to the maritime law, which law governs the case at bar.

The court below also stated that the *Socony* case involved the doctrine of assumption of risk and therefore furnished no analogy to the case at bar. We respectfully submit that the learned court below erred in this conclusion. The defense of assumption of risk is an affirmative defense which is brought into play only after a party is conceded to be liable. In other words, if the facts do not show liability then there would be no need for a defendant to plead any other defense. It is only where a defendant has been shown to be derelict in his duty, then, under certain circumstances he may attempt to exonerate himself by showing that the plaintiff had assumed the risk of the danger. In the *Socony* case the court necessarily had to decide first of all whether the shipowner was liable under the admiralty law for a defective appliance where good ones were available and then to determine whether under the same law, the seaman was bound by the assumption of risk rule. The court was therefore required to specifically answer the problem involved at bar before undertaking the question of assumption of risk. We believe that this factor was overlooked by the court below.

Proceeding with the analysis of the *Socony* case, the court first states the shipowner's duty under the maritime law as follows (P. 428):

> "Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship.'"

Although the seaman himself selected the defective appliance in that case, the court then goes on to say that even

under those circumstances he does not assume the risk of the defective appliance, but the seaman's own negligence called for the application of the comparative negligence rule. In summing up the court stated (P. 430):

> "In the absence of any controlling or persuasive authority to look to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate limits. Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed."

(P. 431):

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

With this background the court then considers the added element of the availability of a safe appliance where a defective one has been selected (P. 431):

> "There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner."

Then, significantly, the court makes the finding which covers the situation at bar (P. 432):

"In either case the seaman's negligence is a contributing cause of his injury, *without which the shipowner would be liable to the full extent of the damage.*"

In other words, if the element of the seaman's own negligence be removed, we have the situation involving both the safe as well as defective appliance with full liability on the shipowner's part. In the case at bar the seaman had nothing to do with the selection of the rope or the rigging of the scaffold. Under these circumstances the shipowner is fully liable without having the benefit of the comparative negligence rule.

The court then concludes by holding that assumption of risk is not a defense under the maritime law and considers the old cases which are peculiarly applicable to the facts at bar (P. 432):

"The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in Olson *v.* Flavel (D. C.) 13 Sawy. 232, 34 F. 477, supra, and The Julia Fowler (D. C.) 49 F. 277, supra, where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper basis for a substantial reduction of damages because of the negligence of the choice. In The Julia Fowler, supra, the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an

exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available."

Although the defense of assumption of risk has not been raised as such, yet the effect of respondent's position is the same. The *Socony* case makes it quite clear in any event that the shipowner is absolutely liable as under the prior maritime law, for any injury due to a defective appliance. This liability cannot be cancelled although it may be lessened where the seaman himself has contributed to the injury. Since petitioner did not in any way contribute to the accident the shipowner, as Mr. Chief Justice Stone stated in the *Socony* case, is "liable to the full extent of the damage".

We earnestly submit that the "Pinar Del Rio", was not intended to overrule the prior maritime law, as is clearly indicated in the *Socony* case, which reviews with approval the authorities under that law. In any event the *Socony* case contains the latest expression on the point and if in fact there is any conflict then the decision in the *Socony* case must prevail.

THIRD POINT.

The negligence of a fellow seaman in selecting a defective appliance from an abundant supply of suitable appliances does not insulate the shipowner from liability.

We have heretofore discussed the problem at bar from the standpoint of whether the shipowner could be absolved because there were other safe appliances which could have been used instead of the defective one. The finding of the court below and the much referred to statement of Mr.

Justice McReynolds that the shipowner was not liable because the mate was negligent in selecting a bad rope when good ones were available, may give rise to the conclusion that the shipowner was insulated from liability by the mate's negligence. This is of course an unsound conclusion because the shipowner is absolutely liable for any defective appliance and this liability cannot be avoided but is only subject to be diminished if the injured man himself was contributorily negligent. However, even if such were not the rule the Master would not be relieved because of the mate's negligence but on the contrary, under the facts at bar, it would be an additional factor fastening liability on the shipowner. Under the common law, and under the general maritime law before the Jones Act, the fellow-servants rule was a valid defense. But there were well defined exceptions to this rule, most important among which is one where a servant is required or authorized by his employment to furnish or provide suitable material for the work in which his fellow servants are engaged. The general rule and the exception were considered at length by Mr. Justice Harlan in *Hough* v. *Texas and Pacific R. R. Co.*, 100 U. S. 213, 25 L. Ed. 612, as follows (L. Ed. P. 614):

> "'The general rule,' said Chief Justice Shaw, in Farwell *v.* R. Co., 4 Met., 49, 'resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and, in legal contemplation, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and

provided for in the rate of compensation as any other.' "

Coming to the exception the court said (L. Ed. P. 615):

"* * *, there are well defined exceptions, which, resting as they clearly do upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

"One and, perhaps, the most important of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first

instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

* * * * * * *

"A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the Company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employes, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation."

It is clear therefore that even under the common law the master is not immune from liability because of a fellow servant's negligence, in proving a defective appliance. Much less can the shipowner avoid liability under the maritime law where the duty is not only non-delegable but is an absolute one.

In the Noddleburn, 28 Fed. 855, a defective rope caused the seaman's fall and injury. In replying to the defense of the fellow servants rule the court held (P. 858):

"'where a servant is authorized and required by his employment to furnish or provide suitable material

or appliances for the work in which his fellow-servants are engaged, whether under his special direction or otherwise, and one of them is injured by reason of his neglect or omission in either of these respects, the common master or employer is responsible in either case.' Gilmore *v.* Northern Pac. Ry. Co., 9 Sawy. 563; S. C. 18 Fed. Rep. 869; Hough *v.* Railway Co., 100 U. S. 213; Chicago, M. & St. P. Ry. Co. *v.* Ross, 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184; Northern Pac. Ry. Co. *v.* Herbert, 116 U. S. 647; S. C. 6 Sup. Ct. Rep. 590."

In the Portland, *supra;* on this point the Court stated (P. 700):

"The second mate testifies that he had certain of the crew make up new slings while on the voyage to this port, and that he himself inspected the slings, both the new and those that had been used, and believed all to be safe for use. In this duty in making up the slings and of inspection, he acted in the stead of the ship, and was therefore vice principal, and the question is resolved into one whether he observed due and reasonable care in the discharge of this duty."

In the Julia Fowler, *supra,* (cited with approval in the Socony case), the seaman was injured by a defective rope negligently selected by the mate from a supply of good rope. In holding the shipowner liable for the negligence of the mate, the Court said (P. 278):

"It is plain that the mate was negligent in the performance of his duties in the use of such a line to rig the triangle in that manner. He ordered the use of this particular rope, and superintended the rigging of it. The defect in the line was manifest upon inspection, as it was spliced, and whipped for smooth running. The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of rigging or methods plainly unsafe, affects both ship and owners with liability for the consequent damage. The chief

officer was not acting in the mere capacity of a fellow-laborer, as in Quinn *v.* Lighterage Co., 23 Fed. Rep. 363; The Queen, 40 Fed. Rep. 694, 697; Hedley *v.* Pinkney, (1892) 1 Q. B. 58. The case is substantially the same as that of the A. Heaton, 43 Fed. Rep. 592, in which this rule was applied in respect to the use of a rotten gasket. See, also, The Frank and Willie, 45 Fed. Rep. 494. The libelant had nothing to do with preparing or rigging the triangle; but when it was ready he was ordered aloft to work upon it, and obeyed."

It is one of the most settled principles in the maritime law that this duty to provide and maintain safe and seaworthy appliances is one which the master cannot delegate to anyone. That duty is imposed upon him as an absolute and non-delegable one. H. A. Scandrett, *supra; Sabine Towing Co.* v. *Brennan, supra;* The Seeandbee, 102 F. (2d) 577; *Socony Vacuum Oil Co.* v. *Smith, supra.*

It seems crystal clear therefore that the negligence of the mate cannot operate to insulate the shipowner from liability but must be considered as an additional ground of liability.

The defective rope in the case at bar was taken from the coil of rope in the lyle gun box. As Judge Biggs said in his dissenting opinion, if there is any place where it may be presumed that sound rope will be found, it is in a life-saving device. The rope lay in the lyle gun box, unused, for at least two years. The vessel made a complete voyage every twenty-one or twenty-two days. By simple calculation the vessl made at least thirty-three complete voyages without this particular rope being used. In fact an old used rope was employed for practice drills with the lyle gun.

Conclusion.

The courts below found as a fact that the rope was defective and respondent has not attempted to deny that fact.

As has been stated from the case of *Work* v. *Leathers, supra*, the shipowner is not excused for known or unknown defects and if a defect develops without apparent cause it is to be presumed that it existed when the service began. Clearly, the respondent here violated its duty at the outset of every one of the thirty-three voyages by failing to supply rope which was sound and adequate. The duty was violated also in maintaining the rope in a defective condition in the lyle box. Nor could the respondent delegate its duty to the mate to supply the petitioner with a safe rope to hold the scafffford upon which he was ordered to ascend. We submit that the respondent is liable to the full extent on any one of these counts.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
Counsel for Petitioner.

PAUL M. GOLDSTEIN
CHARLES LAKATOS
SAMUEL J. STARK
Of Counsel.